IN THE

Supreme Court of the United States

October Term, 1941

No. [redacted] 95

JOSEPH A. PIUMA,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

Opinion.

The opinion of the court below appears in 126 Fed. (2d) 601. A copy is included in the transcript. [R. 76-81.] Also, it is hereinafter excerpted, with comment, in the Summary Statement.

II.

Statement of Jurisdiction.

This court has jurisdiction under Section 240(a) of the Judicial Code, as amended by Act of February 13, 1925, with amendments to June 29, 1938; and under Rule 38, 5(b), Rules of the Supreme Court.

The Circuit Court had jurisdiction under Section 128(a), "First," of the Judicial Code, *supra*.

The District Court had special jurisdiction of this action by the United States to recover special statutory penalties by virtue only of Section 5(*l*) and 16 (15 U. S. C. A., Sections 45(*l*) and 56), of the 1938 amendment to the Federal Trade Commission Act.

> The special right of action created by the above sections of the 1938 amendment is cognizable by a court only if the order is "final, and while such order is in effect." (See Sec. 5(*l*).)

The Federal Trade Commission, in 1934 and 1937, had jurisdiction only under original Section 5 of the Federal Trade Commission Act of 1914. (38 Stat. 717, 719.)

> Thereby, the Commission's jurisdiction reached only to the fact of "unfair methods in competition." "Deceptive acts or practices," eliminating the element of *competition*, and the inclusion therein of "false advertisement * * * inducing * * * the purchase of food, drugs," *et al.*, was added to the jurisdiction by the 1938 amendment, Section 5(a), and new Section 12(a) and (b), 15 U. S. C. A., Sections 45(a), and 52(a) and (b).

III.

Summary Statement of the Matters Involved.

Judgment Involved. This [R. 62-64] was ordered summarily [R. 52] (Rule 56, Federal Rules of Civil Procedure) by the District Court, Southern District of California, Central Division, on July 22, 1941, in a formal opinion, per Judge Jenney [R. 44-52]. It awarded [R. 44, 52] the penalties provided by the 1938 amendment, "45 U. S. C. A. 45(*l*)," to the Federal Trade Commission Act of 1914 (hereinafter called the Act). (38 Stat. 717.)

The Action. This was brought by the United States, April 24, 1940 [R. 27], based on an order of the Federal Trade Commission (hereinafter called the Commission), dated April 6, *1937* [R. 2-10]. The complaint incorporated, as exhibits: (1) the Commission's "Complaint," specifying particular advertisements [R. 10-14], and dated September 5, *1934* [R. 14]; (2) the "Answer" thereto [R. 15-18], which affirmatively challenged the Commission's jurisdiction [R. 16-17], particularly, in that the allegations [R. 16-17, "Par. One," etc.] of injured competition and competitor, and of "unfair method of competition," were pure conclusion or opinion [R. 17, "Three"], and prayed, *inter alia*, that the proceeding be dismissed for "lack of jurisdiction of the subject-matter" [R. 18]; and (3) the Commission's "Findings as to the Facts and Conclusion" [R. 18-27], also dated April 6, *1937* [R. 27]. The United States pleaded *new* particular advertisements, of 1938-1940, which, nevertheless, were alleged to violate the order [R. 7-9]. The *1938* amendment, "Sections 5(*l*) and 16" (45 U. S. C. A., Secs. 45(*l*), 56), was relied upon to recover the penalties claimed [R. 10].

Since his "Answer" before the Commission, and its attempt to procure dismissal of the proceeding, petitioner has always stood upon the defense there stated: The Commission was without jurisdiction, and any resultant order is void.

Petitioner's Pleadings. Petitioner moved *to dismiss* the Government's action, upon the grounds that: *first,* the Commission had been without any jurisdiction to act under the law in effect in 1934 and 1937, and the District Court itself was now without any jurisdiction other than to dismiss; and, *second,* no cause of action was stated under "Sections 5(*l*) and 16" of the amended Act [R. 33]. This was *denied* in a "memorandum of ruling" per Judge McCormick [R. 35-36], but "without prejudice to renew any applicable constitutional question herein at the time of the *hearing* of the action *on the merits*" [R. 36]. (Emphasis supplied.)

Petitioner also moved *to "vacate and set aside"* this denial, upon the fundamental ground that, on the face of the complaint as enlarged by its exhibits, the court was without jurisdiction to make any such order and the same was therefore wholly void [R. 37-38]. But this was not passed upon, until Judge Jenney denied it, in concluding his opinion, *supra* [R. 52]. These motions were supported by points and authorities.

Petitioner also *answered,* denying the terms of the advertisements relied upon by the United States violated the Commission's order in any event, and averring that, on the contrary, they showed he had sought to comply therewith, prior to any change in the law [R. 27-30]. Affirmatively, he pleaded the true content of the advertisements in question depended upon determination of the fact issue

of what may properly be designated "a tonic" possessed of beneficial remedial efficiency, an issue not hereinbefore raised or passed upon [R. 30-32]. Even the Commission's "findings" [R. 25-26] merely denied, generally, the preparation was "a gland tonic" while special findings [R. 21-23] showed that, by common knowledge, the compound appearing would have beneficial remedial efficiency, and the whole was no more than matter of the Commission's opinion. But, throughout, petitioner adhered to his primary defense, that the Commission's order was *wholly void* and of no effect, because made when, under the then existing law, the Commission had no jurisdiction, power or authority to entertain such a proceeding, or make such an order, upon the state of fact reflected in its own findings and, in any event, upon the facts actually provable [R. 28-29, pars. II, III, IV; R. 31, par. V].

Motion for Summary Judgment. This [R. 38], petitioner opposed [R. 39-40]. Supported by points and authorities, he first restated his ground, the order "is null and void," because "beyond any jurisdiction of the Commission;" and, second, urged "any breach" depends further upon a question of fact, whether the preparation possesses tonic capacity. He submitted his affidavit [R. 40-41] that, from his own extended experience, by that of actual users of the preparation, and by the testimony of experts, it was true the compound in question had produced the beneficial effects and results, and did possess the beneficial capacity claimed for it in the advertisements in suit. By the motion, all this was admitted to be true. The United States filed no affidavits. Judge Jenney's opinion, *supra* [R. 49-51], rejected petitioner's grounds, including his affidavit, and, in so doing, expressly relied on the 1938 amendment, particularly its provision making

the Commission's order "final," and the further provision for "a review" by the Circuit Court. (15 U. S. C.A., Sec. 45(g), (c), (d).) Findings and Conclusions were made accordingly [R. 52-62]. In the absence of a trial, and of any evidence in plaintiff's behalf, such findings necessarily rest upon and reflect only the case made in the pleadings, and the statutory provisions the court had invoked in its opinion, *supra*. It is noticeable there is no direct finding the advertisements actually related to or effected any *sales* in interstate commerce [R. 58-60, pars. IX, X].

Opinion on Appeal. This is very brief. It refers to no authorities. It disregards all petitioner's pleadings, except his answer. It ignores all his grounds for relief in such pleadings appearing. So, also, all the necessarily resultant deprivations of his constitutional rights, to conduct his business without unreasonable and unwarranted restraint or interference, and his freedom of speech and of press to advertise the fact of the same, as guaranteed by the Fifth and First Amendments of the Constitution. Likewise it completely eliminates all question of the constitutional duty of the District Court upon the case presented before it, to inquire independently whether the true state of fact in the case gave jurisdiction for the Commission's order, as a matter of "due process" under the Fifth Amendment. (*Crowell v. Benson,* 285 U. S. 22, 54-55, 56, 60-61, 76 L. Ed. 598, 614-615, 615-616, 617-618; 39 *Columbia Law Review,* 259, 272, notes 99 and 100, citing *Crowell v. Benson, ante.*)

After dubbing petitioner's preparation a "nostrum," and quoting the Commission's order, the gist is:

> "The order was served on appellant on April 10, 1937. No petition to review it was ever filed. It

therefore became final on May 20, 1938, and was at all times thereafter in full force and effect." [R. 77.]

Reciting the action, and quoting the new advertisements relied on as violations, the opinion continues:

"Answering, appellant admitted all material allegations of the complaint. There being no issue as to any material fact, appellee moved for a summary judgment. The motion was granted and judgment was entered in appellee's favor for $3,250 ($250 for each violation of the Commission's order) and for costs. From that judgment this appeal is prosecuted.

"The appeal is a frivolous one. Facts warranting the judgment were alleged in the complaint and admitted in the answer. Thus, instead of a defense, the answer was, in effect, a confession of judgment. There was and is no basis for an appeal. * * *

"Copies, admitted to be true copies, of the Commission's complaint and report are attached to and made part of appellee's complaint. Therefrom it appears that the Commission charged and found all facts essential to its jurisdiction. Its findings are not here open to review." [R. 78-79.]

This is in complete disregard of all of petitioner's other pleadings, and the matters of defense raised thereby.

To support its statement [R. 79, note 4]: "the Commission charged and found all facts essential to its jurisdiction," the opinion sets forth what was so "charged and found" regarding competition, to-wit: "in competition with persons, firms, partnerships and corporations" (specifying or indicating none in particular, and thus covering generally every possible busi-

ness entity)—"in the interstate sale of other preparations used and useful"—(again specifying nothing, and simply covering the entire field of remedial "preparations" occupied also by petitioner). The note's statement here is accurate. The Commission did, actually, so charge [R. 12] and find [R. 21], and it made no other findings in that regard. But the court does not note that this very form of broad generalized charge, findings and evidence is that which was condemned by *Federal Trade Commission v. Raladam Co.* (1931), 283 U. S. 643, 653, 75 L. Ed. 1324, 1332, as being merely "matter of conjecture," and wholly ineffective and insufficient to supply the indispensable element of injury to competition and competitor. The court does not even mention the case. Yet it was the law in 1934, when the complaint was filed, and in 1937, when the order was made. The 1938 amendment made the first change therein: by eliminating the element of competition, when "deceptive acts or practices" were concerned. (15 U. S. C. A., Sec. 45(a), and new Section 52(a) and (b).)

Also, regarding the subject-matter of the proceeding itself, the same note states it was "charged and found" [R. 80]: petitioner was "making the representations from which the Commission ordered him to cease and desist;" which "were false and misleading and constituted unfair methods of competition in commerce." This statement, however, is not wholly accurate. It does not appear the court made any analysis of the complaint and order, or their context in the entire record. Such shows that the findings [R. 25, "Paragraph Four," first part]—which were

carried verbatim into the order in ten numbered items [R. 5-6]—departed from the particular ten numbered items specifically stated in the complaint [R. 12-13]. This was accomplished by combining numbers 5 and 6 of the complaint [R. 12], with interpolations of "in gland remedies" [R. 25, and R. 6, No. 5], and providing a wholly new number 10 [R. 25, and R. 6, No. 10]. This resulted in a finding, and entry in the order, upon an issue not tendered in the complaint and, therefore, a finding inadmissible. But, further, analysis also reveals that the ultimate finding is: that "said preparation Glendage does not possess *the therapeutic efficacy* represented and implied by the respondent" [R. 26] (emphasis supplied). This, however, states no more than the Commission's *opinion,* not any fact, as to "the" extent of efficacy, and does not state there was none in beneficial amount. And previously [R. 21-23], as basis for this, there appear findings of specific fact, setting forth the various ingredients and quantities compounded into the preparation. By common and judicial knowledge, the combination stated would have tonic efficacy, and the findings themselves provide one source of such information: "U. S. P." (United States Pharmacopœia) [R. 22, 23]. They also state the content included "glandular" substances [R. 22, 23]. Thus the "unfair method," "charged and found," related not to a subject-matter of fact, to some substance or article falsely passed off as something else; but only to a matter of opinion, concerning the extent of remedial efficacy of a medicinal preparation compounded of various active elements. It is very noticeable it is *not* charged the preparation was dangerous, or needed medical direction in taking; or that it was

fraudulently represented; or even that petitioner knew, or had reason to know, his representations were essentially false. The gist of the findings is: that, by reason of its lack of "the efficacy," purchasers were "misled and deceived" in buying Glendage; *not* that they bought it, while desiring, or intending to buy, some other known or established article or substance [R. 26, "Five"]. But matters of *opinion* on the part of the Commission, concerning matters of the character of the foregoing, were not within the Commission's jurisdiction in 1934 and 1937.

The opinion concludes:

"Because the Commission's order was prior to the enactment of 5(*l*) of the Federal Trade Commission Act, 15 U. S. C. A. 45(*l*), under which this action was brought, appellant contends that 'the award of penalties was *ex post facto* and constitutionally void.' There is nothing in the point; for, although the order was prior, appellant's violations of the order were subsequent to the enactment.

"Other contentions made by appellant are so devoid of merit as to require no discussion." [R. 80-81.]

The foregoing does not truly state what petitioner "contends" regarding *"ex post facto."* Instead, he maintains that the District Court's grant of *summary judgment* for the penalties of the 1938 amendment deprived him of his defense that the Commission's order was void *ab initio,* and that, through such deprivation, the amendment's various provisions were so applied, under the guise of a "procedural change," as to constitute a violation of the constitutional inhibition of federal legislation *ex post facto,* within the principles of the controlling authorities petitioner cited.

Likewise, it is not true that "Section 5(*l*) was added to the Federal Trade Commission Act by 1107 of the Act of June 23, 1938, c. 601, 52 Stat. 1028." The latter statute was the "Civil Aeronautics Act of 1938." In subsection (f) of Section 1107 thereof, section *5(a)* of the Federal Trade Commission Act was "further amended" by insertion therein of the words: "air carriers subject to the Civil Aeronautics Act of 1938." "Section *5(l)*" was enacted by Public No. 447, 75th Congress, March 21, 1938, 52 Stat. 111, 114, and has since remained unchanged. Perhaps the court was misled by the citations appearing at the end of Section 45(*l*) of 15 U. S. C. A.

Petition for rehearing was filed, but denied April 15, 1942 [R. 82]. Hence, this petition for certiorari.

IV.

Statement of Questions Presented.

The basic problem here is this: Where the sole and express purpose of an order of the Commission—(made *only* under the authority granted by the original Act of 1914 and resting *only* on the "findings of fact" here appearing)—is to restrain and restrict the conduct of a business and the manner and method of its advertising of a compounded medicinal preparation, and where, in an action by the United States on such order to recover penalties for alleged violations of the order by new advertising—(brought *only* under express provisions of the 1938 amendment of the Act)—not only any violation is denied by petitioner as a matter of fact, but the validity of that order is challenged—(as theretofore before the Commission)—on the ground that it is utterly *void* because made beyond any jurisdiction of the Commission in the premises, how and how only, under the Constitution of the United States, must that action, and particularly that challenge of the order's validity, be tried and disposed of by the court in which the action was brought by the United States?

Essential in the solution of this problem are the following questions, which are presented to justify review by this Court. Each of these is framed to include different classes of fundamental objections urged against this judgment, and the affirming opinion.

1. *Is not this summary judgment wholly unjustified and insupportable, and its sanction by the Circuit Court wholly erroneous, because of its conflict with fundamental constitutional requirements and provisions, and the applicable decisions of this Court, in each of the following respects?*

(a) No administrative agency, even a "legislative court," can exercise, or be authorized to exercise, the constitutional judicial power established by Article III, Sections 1, 2, of the Constitution, as declared by this Court in *Williams v. United States,* 289 U. S. 553, 561, 565, 581, 77 L. Ed. 1372, 1374, 1376, 1385; *O'Donoghue v. United States,* 289 U. S. 516, 529-530, 535-536, 544-545, 550-551, 77 L. Ed. 1356, 1360, 1363, 1367-1368, 1370-1371; *Ex parte Bakelite Corp.,* 279 U. S. 438, 449-450, 451-452, 459, 460-461, 73 L. Ed. 789, 793, 794, 797, 798; and related cases. See *Federal Trade Commission v. Raladam Co.,* 283 U. S. 643, 648(4), 649(7).

(b) When there is question of the jurisdiction, *i. e.,* "the right to *adjudicate* concerning the subject-matter" (emphasis supplied), of an administrative agency to deprive a person of rights and freedom guaranteed by the Constitution or its amendments, the "due process"—"day in court"—guaranteed by the Fifth Amendment can be satisfied only by the determination of a constitutional court exercising constitutional judicial power, and such a court must necessarily make its determination *de novo,* else there is no independent determination, as declared by this Court in *Crowell v. Benson,* 285 U. S. 22, 45-46, 56-57, 60-61, 63-64, 76 L. Ed. 598, 609-610, 615-616, 617-618, 619-620; *St. Joseph Stock Yard Co. v. United States,* 298 U. S. 38, 49-50, 51-53, 80 L. Ed. 1033, 1040, 1041-1042; *United States v. Idaho,* 298 U. S. 105, 109-110, 80 L. Ed. 1070, 1074-1075; and related cases. See *Federal Trade Commission v. Curtis Publishing Co.,* 260 U. S. 560, 580, 67 L. Ed. 408, 413. Compare *Shields v. Utah Idaho R. Co.,* 305 U. S. 177, 184-185, 83 L. Ed. 111, 117. See, also, *Reynolds v. Stockton,* 140 U. S. 254, 268, 35 L. Ed. 464, 468.

(c) To construe the provisions of the 1938 amendment as a Congressional attempt to empower the Commission to make final adjudication of the matter of its own jurisdiction—as distinguished and differentiated from decisions arrived at within unquestioned jurisdiction—is to render the amendment unconstitutional in that respect and to that extent, and should be avoided, as declared by this Court in *Crowell v. Benson, supra,* at 46, 49, 54-55, 56, 58, 62, 76 L. Ed. at 609-610, 611, 614-615, 616, 617, 619; *St. Joseph Stock Yard Co., supra,* at 50-51, 80 L. Ed. at 1040-1041; and related cases. See, also, *United States v. Idaho, supra,* and *Shields v. Utah Idaho R. Co., supra.*

(d) To so construe and apply the altered procedural provisions of the 1938 amendment (15 U. S. C. A., Secs. 45(*l*) and 56) as to deprive the defendant of his vested right of defense grounded in the *ab initio* void character of the Commission's order, and visit him with penalties thereby, rendered that part of the amendment a violation of Article I, Section 9, Clause 3, of the Constitution, prohibiting Congressional legislation *ex post facto,* and it is immaterial that the penalties be called "civil," or that the particular act involved be not a "crime" in any strict sense, as declared by this Court in *Thompson v. Utah,* 170 U. S. 343, 351-352, 42 L. Ed. 1061, 1067; *Cummings v. Missouri,* 4 Wall. 277, 325, 18 L. Ed. 356, 363-364; *Burgess v. Salmon,* 97 U. S. 381, 385, 24 L. Ed. 1104, 1106; *Ex parte Garland,* 4 Wall. 333, 377-378, 18 L. Ed. 366, 369-370; and related cases. See, also, *Lindsey v. Washington,* 301 U. S. 397, 401, 81 L. Ed. 1182, 1186.

2. *Is not this summary judgment further unjustified and improvident, and its sanction by the Circuit Court further erroneous, because in conflict with the principles and rules governing the jurisdictional requirements of the Act of 1914, and applicable decisions of this Court, and of other circuits, in the following respects?*

(a) Any order of the Commission under that Act can only be supported, as being within its jurisdiction, by specific findings of fact establishing injury to identified competition and identifiable competitor, and this element is primary and indispensable, as declared by this Court in *Federal Trade Commission v. Raladam Co.,* 283 U. S. 643, 644-646, 653-654, 75 L. Ed. 1324, 1328, 1332, and related cases; and as held by the Circuit Court, 6th Circuit, in *Raladam Co. v. Federal Trade Commission,* 42 Fed. (2d) 430, 434-435 (second *Raladam* case). Although certiorari was granted in this case (86 L. Ed. (Adv. Ops.) 562, memo.), it is not presumed such will affect the principles applicable here. See, also, *Federal Trade Commission v. Curtis Publishing Co.,* 260 U. S. 568, 577-579, 580-581; *Federal Trade Commission v. Royal Milling Co.,* 288 U. S. 212, 214-215, 216, 77 L. Ed. 706, 707-708, 709.

(b) To be within the subject-matter or class of cases contemplated by that Act, any order must be supported by findings dealing only in terms of established and stated facts, and not merely in matters of *opinion* formed upon indeterminate and inconclusive, and even contradictory, factual conditions, *i. e.,* as in the present case, the extent of remedial efficiency of a medicinal preparation compounded of various active elements, as declared by this Court in *American School etc. v. McAnnulty,* 187 U. S. 94, 104-105, 105-106, 106-107, 108, 109-110, 110-111, 47 L. Ed. 90, 94-95, 95, 96; and related cases (the case itself

having been cited more than one hundred times in its various aspects); and as recognized by the Circuit Court, 6th Circuit, in *Proctor and Gamble v. Federal Trade Commission,* 11 Fed. (2d) 47, 48(2)

(c) To satisfy the legal measure and standard of the "findings of fact" required of any administrative agency, to establish that its action has been *within* its particular jurisdiction, and therefore "conclusive" and to that extent "final," such "findings" must be precise and exactly indicative, not merely general, vague or speculative, and therefore "aribitrary and capricious;" otherwise the action taken by the agency will be tested and disposed of in a court in any manner appropriate in the case, as particularly declared by this Court in *Federal Radio Commission v. Nelson Bros. etc. B. & M. Co.,* 289 U. S. 266, 277, 77 L. Ed. 1166, 1174; *Florida v. U. S.,* 282 U S. 194, 212-213, 75 L. Ed. 291, 303; *Fed. Trade Commission v. Raladam Co.,* 283 U. S. 643, 652-653, 654, 75 L. Ed. 1324, 1332; *Federal Trade Commission v. Curtis Pub. Co.,* 260 U. S. 568, 582, 67 L. Ed. 408, 414; *Crowell v. Benson,* 285 U. S. 22, 49-50, 63, 76 L. Ed. 598, 612, 619.

3. *Is not this summary judgment still further unjustified and unsupported, and its sanction by the opinion of the Circuit Court still further erroneous, and in conflict with established principles of law and procedure, and with the decisions of this and other courts, in the following respects?*

(a) An order or judgment which is void on its face is a mere nullity in any event; but, further, when an action is brought upon an order or judgment which is void for lack of jurisdiction, such action may be defended against in any appropriate manner, even by evidence *de hors* the record on which the action is founded in its pleadings,

and contrary to the recitals therein, as declared by this Court in *Thompson v. Whitman,* 18 Wall. 457, 467-468, 21 L. Ed. 900, 901; *Reynolds v. Stockton,* 140 U. S. 254, 264-265, 35 L. Ed. 464, 467; *Bigelow v. Old Dominion Copper Co.,* 225 U. S. 111, 134, 56 L. Ed. 1009, 1024; *National Exchange Bank v. Wiley,* 195 U. S. 257, 270, 49 L. Ed. 184, 190; and related cases.

(b) For purposes of summary judgment under Rule 56(c), Rules of Civil Procedure, a court is limited to determination of whether there is any genuine issue of fact, any "arguable defense," or matter of "ambiguity," involved by the pleadings and affidavits in a given case, and is precluded from making disposition of such an issue in any event. (*Saunders v. Higgins* (D. C. N. Y., 1939), 29 Fed. Supp. 326, 328(7); *Chas. Blum Adv. Corp. v. Mayers Co.* (D. C. Pa., 1939), 25 Fed. Supp. 934, 935; *Kent v. Hanlin* (D. C. Pa., 1940), 35 Fed. Supp. 836, 837. Compare *Port of Palm Beach Dist. v. Goethals,* 104 Fed. (2d) 706. See, also, *McComsey v. Leaf,* 36 Cal. App. (2d) 132, 140, and *Walsh v. Walsh,* 18 Cal. (2d) 439, 441(1), 442(2a), 444(2b), 443-444(3, 4, 5). The Federal Rule and the California statute follow substantially the New York statute.)

But, by reason of petitioner's rights in his defenses against the void order, the court in this case was particularly precluded from wholly rejecting the issues tendered, and from basing its rejection on the assigned grounds, that the order defended against was "final" and "*res adjudicata*" [R. 49], and the proffered "evidence should have been submitted * * * before the Commission" [R. 50]. As was his right, petitioner throughout had stood upon his repeatedly-pleaded defense that both the charge and the order were without jurisdiction, and the order was wholly void for that reason.

V.

Reasons for Issue of the Writ.

Upon the foregoing, it is urged this Court should review this case for the following reasons within the principals of Rule 38, 5(b), of the Rules of the Court:

1. A Federal Statute is involved, to-wit, the 1938 amendment to the Federal Trade Commission Act, the proper interpretation and construction of which presents a vitally important question.

2. The District Court has put upon that statute ,and the Circuit Court has sanctioned, a construction which probably renders it unconstitutional in at least one of its aspects and purposes, in that, by such construction, it is made to confer on the Federal Trade Commission the power to adjudicate finally the question of its own jurisdiction, even when constitutional rights and freedoms of a defendant are thereby lost, contrary to the most fundamental principles and mandates of the Constitution, and the decisions of this Court hereinbefore specified.

3. Also, the District Court has made, and the Circuit Court has sanctioned, a construction of that statute which probably brought it in conflict with the Constitutional inhibition of legislation *ex post facto,* in that the statute, by such construction, is made to operate to deprive a defendant of a vested right in his defense against an action brought on an order of the Commission: that that order had been void *ab initio;* and to visit him with penalties accordingly, contrary to decisions of this Court hereinbefore specified.

4. The decisions of the District Court, and of the Circuit Court, are each in probable conflict with various decisions of this Court and of other circuits, in the re-

spects hereinbefore specified, and therefore this Court should exercise its supervisory powers to restore and preserve harmony of decision and precedent.

5. As hereinbefore specified, the District Court has disregarded and departed, and the Circuit Court has sanctioned such disregard and departure, from established principles and practices of procedural law, in respect to defenses against void judgments and orders, and also in respect to the granting of summary judgments, again justifying an exercise of this Court's supervisory powers.

Conclusion.

Thus far, in every court and at the hands of every judge that has dealt with it, this case has been made to fit into a single pattern. Apparently by the merest inspection of the Commission's proceedings, certainly without any analysis thereof or demonstration thereby, and most certainly without any consideration of other material and pertinent facts, even those of common and judicial knowledge, it has been repeatedly and consistently stated and held: that the Commission's proceedings met and showed all "requirements" [R. 35-36], "prerequisites" [R. 47-48], and "facts essential" [R. 79, note 4], to the exercise of its jurisdiction; that, because no "review" of the order, as permitted by the Act both before and after the 1938 amendment, was ever had, such order, by other provisions of that amendment, became "final," and thereafter immune to any attack, any time, anywhere or in any proceeding [R. 36, 48-51, 77, 79]; and that, thereby, in this case, a summary judgment on the plaintiff's complaint based on the Commission's proceedings was proper, regardless of the particular fact issues tendered, and also regardless of all constitutional questions involved [R. 52,

78, 80-81]. It is submitted that, within the Constitution, the question of the Commission's jurisdiction has never been adjudicated in any court.

Wherefore, petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said Circuit Court had in the case numbered 9934 and entitled "Joseph A. Piuma, Appellant, v. United States of America, Respondent," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and the judgments herein of the Circuit Court and of the District Court be reversed by this Court; and, in view of the matters hereinbefore appearing, it is further prayed that such reversal be with directions to the District Court to dismiss the action.

Dated May 15, 1942.

LOUIS J. CANEPA,
Attorney for Petitioner.

C. M. CASTRUCCIO,
HORACE W. DANFORTH,
Of Counsel.

State of California, County of Los Angeles—ss.

Louis J. Canepa, being first duly sworn, deposes and says: That he is one of the attorneys for Joseph A. Piuma, petitioner herein; that he has caused the foregoing petition to be prepared, and is familiar with the same; that it is filed in good faith, and possesses merit, as he verily believes.

LOUIS J. CANEPA.

Subscribed and sworn to before me this 15th day of May, 1942.

RUTH A. VETTER,
Notary Public in and for Said County and State.

Due service of the within petition is hereby acknowledged this.....day of May, A. D. 1942.

_____

_____

Attorneys for Respondent.

5-15-42—60